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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

No. .....

JACOB SENKO,
Petitioner,

vs.

LaCROSSE DREDGING CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Fourth District Appellate Court of the State of Illinois.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Jacob Senko respectfully petitions that a Writ of Certiorari issue to review the judgment of the Fourth District Appellate Court of the State of Illinois, which became final on the 13th day of January, 1956.

OPINION BELOW.

The opinion of the Fourth District Appellate Court of Illinois is reported in 7 Ill. App. 2nd 307, 129 N. E. 2nd 454, and a copy thereof may be found as an appendix to this petition. The Supreme Court of Illinois denied leave to appeal without written opinion (S. C. R. 169).

"The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

"In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water; Provided, that as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948 and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: Provided further, that no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage." June 19, 1948, c. 526, 62 Stat. 496; 46 U. S. C. A., Sec. 740.

STATEMENT OF THE CASE.

In 1946 the U. S. Army Corps of Engineers, through various contractors and subcontractors, including the respondent, LaCrosse Dredging Corporation, commenced construction on the Chain of Rocks Canal Project (Abs. 41). The canal, which bypasses a treacherous rocky section of the main river channel, was part of a long range over-all plan to make the river more navigable as a whole (Abs. 41, 53).

The canal, as designed, ran generally north and south from a point in the river north of Hartford, Illinois, to a point in the river near Venice, Illinois. Included as a part of the canal was a lock known as Lock No. 27, which was located at a place about one-mile north of the southerly end of the canal (Abs. 41). South of Lock 27 and for a portion of its length north thereof, the canal followed old Gabaret Chute, a slough which had run more or less parallel to and connecting at both ends with the Mississippi River (Abs. 41, 60, 61). In past years this chute had been used for swimming and boating. It had also been used commercially by boats and barges hauling mules, coal wagons and other livestock from the mainland to Gabaret Island. A ferry had been operated across the chute from the mainland to Gabaret Island, but this ferry had been discontinued prior to the time construction began on the canal (Abs. 28, 61, 63, 84, 85).

In 1947, when respondent began its dredging operation on the south part of the canal, it came up Gabaret Chute from the river widening and deepening the canal as it moved north (Abs. 36, 41, 115). Among the dredges owned and operated by respondent was the "James Wilkinson." Built by the St. Louis Shipyards, it was 136 feet long and 36 feet wide with a draft of 5½ feet. Like all dredges, its principal equipment consisted of a large pump driven by a Diesel motor. It also had auxiliary motors used to operate its generating plant, winches and the "spuds" at the rear of the dredge (Abs. 116, 119).

Some time late in 1950 or early 1951 the James Wilkinson was brought up the south part of the canal by dredge tenders, and on November 5, 1951, was operating near the south end of Lock 27 (Abs. 80, 115). At that time the canal in the area where the James Wilkinson was operating was 200 to 300 feet wide (Abs. 29, 37, 107). Soundings taken in August of 1951 showed that there was a minimum 10-foot channel from the south end of the locks down the south part of the canal to the river, and by November 5, 1951, the water was deeper than it was in August, 1951 (Abs. 50, 51). Prior to November 5, 1951, small tugs had gone in and out of the south mouth of the canal. In August of 1951 bulkheads were hauled up to Lock 27 through the south part of the canal on a barge. A derrick barge about 200 feet long, 35 feet wide and with a full draft of 5 or 6 feet was also towed up to the lock (Abs. 50, 51, 57). Prior to 1951 a concrete plant, silos and other equipment were shipped in and out of the south part of the canal. A loading dock was built in 1947 about 400 yards below the locks and about 6 barge loads of sheet piling and whorley cranes were shipped in and out of the canal over this dock (Abs. 61).

The James Wilkinson operated with a crew of four, the engineer, the operator or lever man, the oiler and the laborer or deckhand (Abs. 81).

The operator handled the controls, the engineer ran the machinery, the oiler oiled the machinery and kept it up. All the remaining work on the dredge was done by the laborer or "deckhand" (Abs. 81).

The petitioner on November 5, 1951, had been working on the dredge for over a year as the laborer or deckhand. Since the job was on a 24-hour basis, there were three crews that operated the dredge, each crew taking an 8-hour shift. The men ate and lived at their respective homes ashore. Petitioner lived at Mount Olive, Illinois, some 40 miles from the job, and drove back and forth every day

(Abs. 88). His duties were to bring supplies from shore and store them on the dredge, clean up the deck and other parts of the dredge, splice ropes, take soundings for the dredge operator and generally to keep the dredge in shape (Abs. 30, 31, 38, 47, 48, 88, 95). Petitioner and the other members of the crew, in accordance with Government regulations and orders from the company, wore life jackets when they were on the outside decks or going back and forth to shore in the small boat or dredge tender (Abs. 81, 88).

The operator, engineer and oiler all belonged to the Operating Engineers Union, while the deckhand belonged to the Laborer's union. Men from Operating Engineers always handled small boats. They were all paid at an hourly rate with time and one-half for overtime on a 40-hour week basis (Abs. 37).

Respondent maintained a wooden shed on the bank of the canal, where the men kept their clothes and warmed themselves at a coal stove (Abs. 82). On the date in question petitioner came ashore to bring three lanterns from the dredge for the use of the shore party in signaling to the dredge. He gave one of these lanterns to one of the shore party and took the other two to the shanty. While there, he was injured as a result of an explosion or flash in the stove. It was not clear whether the explosion itself caused him to be thrown out of the shed or whether he was knocked out by respondent's superintendent who was there at the time and rushed out as the stove exploded (Abs. 88, 89).

Senko was paid some compensation under the provisions of the Workmen's Compensation Act of Illinois and was given medical attention by respondent.

In August of 1952, prior to the time he was represented by counsel, he filed an application of Adjustment of Claim under the Illinois Compensation Act. On February 4,

1953, at which time he had retained counsel, petitioner appeared at a hearing before an arbitrator and stipulated with respondent that on the 5th of November, 1951, they were operating under the provisions of the Workmen's Compensation Act of Illinois (Abs. 103, 104). Subsequently an award was entered by the Commission granting him compensation. Pending the filing of this suit under the Jones Act, an appeal was taken by petitioner, which appeal is still pending. No final decision has ever been rendered under the Workmen's Compensation Act. On the 20th of March, 1953, petitioner commenced this action in the City Court of Granite City, Illinois, under the provisions of the Merchant Marine Act as amended (46 U. S. C. A. 688), alleging in his complaint that he was a seaman and "member of the crew" of the dredge James Wilkinson (Abs. 1-7).

At the trial of this cause before a jury numerous witnesses testified on behalf of plaintiff, outlining generally the condition of the canal and locks on the date of the accident and prior thereto, the duties of plaintiff in his work on the dredge, and the nature and extent of his injuries. The stipulation was introduced into evidence and argued before the jury. The jury returned a verdict in favor of plaintiff in the sum of $30,000.00 under the Jones Act, which through remittitur by the trial court was subsequently reduced to $20,000.00 (Abs. 143, 144).

Defendant prosecuted an appeal to the Fourth District Appellate Court of the State of Illinois, which on the 3rd day of October, 1955, reversed the finding of the jury and the judgment of the trial court in its entirety and rendered judgment for defendant (Abs. 157).

Plaintiff thereafter filed a Petition for Leave to Appeal with the Supreme Court of the State of Illinois, which Petition was denied without opinion on the 13th day of January, 1956 (S. C. R. 169).

ARGUMENT.

I. Can a State Court Disregard the Jury's Findings of Fact That a Man Is a Seaman and Substitute Its Own Findings of Fact When There Is Evidence Supporting the Jury's Findings?

In **Tennant v. Peoria & Pekin Union Railway Co., 321 U. S. 29, at page 35,** this court said:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. **It is the jury, not the court, which is the fact-finding body.**"

The plain language of that decision and of **South Chicago Coal & Dock Co. v. Bassett, 1940, 309 U. S. 251, 60 S. C. 544, 84 L. Ed. 232,** and **Lavender v. Kurn, Trustee of San Francisco Ry. Co., 327 U. S. 645, at 653,** finds little if any support in the Fourth District Appellate Court of the State of Illinois. Its view on the weight to be accorded a jury verdict is best illustrated in its own words:

> "Further, that the provision of law making the compensation act the exclusive remedy of employees on vessels other than the master and members of the crew, is binding on the court and **cannot be evaded by asserting that a jury's notion** of what law should be applied nullifies that provision, where there is no substantial dispute as to the relevant facts."

Not only did the court ignore the petitioner's right to a trial by jury as granted by 46 U. S. C. A., Sec. 688, it also reached a conclusion on the facts in conflict with decisions of the First Circuit Court of Appeals (Gahagan Construc-

tion Co. v. Armao, 165 F. 2nd 301, 1948), Fourth Circuit Court of Appeals (Summerlin v. Massman Const. Co., 199 F. 2nd 715, 1952), and Fifth Circuit Court of Appeals (McKie v. Diamond Marine Co., 204 F. 2nd 132).

In the "Gahagan" case the First Circuit held a dredge worker who performed substantially the same duties aboard his dredge as did the petitioner on the James Wilkinson to be a seaman and "member of the crew." Like petitioner, he worked an eight-hour shift, signed no articles and lived and boarded ashore.

In the "Summerlin" case the Fifth Circuit Court of Appeals held a fireman on a derrick barge to be a seaman and "member of the crew" irrespective of the fact that he lived ashore.

The Fifth Circuit in the "McKie" case followed the prior decisions on this subject and held that a submissible case for the jury was presented by evidence that plaintiff was a dredgeworker engaged in the usual work of persons attached to that type of vessel despite evidence that he lived ashore, was not an articled seaman, and worked a regular eight-hour shift.

The Federal Court's opinions disclose a general unanimity of decision in allowing the jury's verdict to stand in cases under the Jones Act and the Federal Employers' Liability Act except "when there is a complete absence of probative facts to support the conclusion reached." **Lavender v. Kurn, 327 U. S. 645, at 653; South Chicago Coal & Dock Co. v. Bassett, 1940, 309 U. S. 251, 60 S. C. 544, 84 L. Ed. 232,** and **Gianfala v. The Texas Co., 350 U. S. 879.** However, there still exists a definite conflict on this point between the state courts in Illinois and this court, as evidenced by the decision in **Harsh v. Illinois Term., 351 Ill. App. 272, rev. 348 U. S. 940,** and the case here presented to the court.

An examination of the evidence presented by petitioner, keeping in mind the test adopted in **Lavender v. Kurn, 327 U. S. 645, at page 652,** and **Tennant v. Peoria & Pekin Union Ry. Co., 321 U. S. 29, at page 35,** shows that petitioner cleaned up the dredge, took care of supplies (Abs. 88), took soundings. (Abs. 88, 246), that he only went ashore when he was doing something for the boat, that he watched for the signals from the shore party and relayed them to the engineer (Abs. 92, 93). The operator of the dredge, who had been working on the river for some twenty-five years, stated that petitioner's duties were to keep the dredge clean, take lanterns to the shore (Abs. 30, 31), splice ropes and keep everything in shape (Abs. 31), and that among dredge workers the person doing that job is called a "deckhand" (Abs. 32, 33). Undoubtedly, here is "an evidentiary basis for the jury's verdict." Although her travels were confined to the movement incidental to dredging in the canal during the year that petitioner was aboard, he did accompany her on whatever travels she did make.

Granted, the fact that petitioner slept at home and boarded ashore lend support to respondent's contention that he was not a seaman, but as was said in Gahagan Const. Co. v. Armao, 165 Fed. 2nd 301, at 305 (First Circuit, 1948):

> "If different conclusions may be drawn from the facts, the determination of the finder of facts must stand. **South Chicago Coal & Dock Co. v. Bassett, 1940, 309 U. S. 251, 60 S. Ct. 544, 84 L. ed. 732.** Each case presents a different situation. No single factor is controlling, but the whole context must be considered."

II. When a Different Conclusion Can Be Drawn From Undisputed Facts, Can a State Court Substitute Its Conclusions for the Verdict of the Jury?

The Appellate Court bases its right to review the facts on a finding that there was no substantial dispute as to the relevant facts. This case was contested for four days in the trial court; a total of ten witnesses testified concerning petitioner's duties, the nature of the project on which he was working and his status. There were serious conflicts in the testimony concerning these factors. For example, respondent's witness Lakin testified that petitioner worked for him in the shore party at various times (Abs. 106), while several of petitioner's witnesses stated that he worked exclusively with the dredge crew.

Witness Thompson, Vice-President of the Respondent Corporation, testified that the men on the dredge did not take soundings (Abs. 83), while petitioner testified that soundings were taken by him from the dredge (Abs. 88, 95). Actually, and more important, there is an inherent conflict in the testimony of each of petitioner's own witnesses, as is true of every contested case, in that some of the facts testified to by each witness would lead the jury to one conclusion, i. e., that Senko was a seaman, while other facts testified to by the same witness would lead them to the opposite conclusion, i. e., that he was not a seaman. Is this conflict to be resolved by the Appellate Court or the jury? As was said by this court in **Tennant v. Peoria & Pekin Union Railway Co., 321 U. S. 29, at page 35:**

> "The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable (cases cited). That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn

different inferences or conclusions or because judges feel that other results are more reasonable."

Assuming that there was no dispute or conflict as to the material evidence, the Appellate Court decision is still not in accord with the rule as laid down by this court in **Gianfala v. The Texas Co., 350 U. S. 879.** In that case involving a fireman on an oil drilling barge only one witness was called on behalf of the plaintiff to show her deceased husband's status as a seaman. This witness was examined and cross-examined by both parties and a stipulation was adopted that the remaining six-man oil drilling crew would testify to substantially the same facts. There were no witnesses called by the defendant and solely on the testimony of one witness the jury held that the deceased was under the "Jones Act" and rendered a verdict in favor of the widow. The Fifth Circuit Court of Appeals (222 Fed. 2nd 382), as did the Fourth District Illinois Appellate Court, held that since the facts were not in dispute the status of decedent was a question of law to be determined by the judge. Petition for Certiorari was granted and the judgment of the Court of Appeals was reversed with directions to the District Court to reinstate its judgment. In its per curiam decision this court cited its own decision of **South Chicago Coal & Dock Co. v. Bassett, 309 U. S. 251, 60 S. Ct. 544, 84 L. ed. 732,** and **Gahagan Construction Co. v. Armao, 165 F. 2nd 301,** wherein the court said at page 305:

"Even if the facts are undisputed, the question of whether a party is a member of the crew is not necessarily one of law. If different conclusions may be drawn from the facts, the determination of the finder of facts must stand."

It is apparent then that little, if any, distinction should be drawn between a case where the facts are disputed and one where they are undisputed. In both situations the

jury is entitled to weigh the evidence and reach their own conclusion. The resulting verdict must stand if it is supported by any probative evidence.

III. Can Any of the Operating Personnel of a Dredge Operating on the Inland Waterways of the United States Be a "Member of the Crew" of a Vessel Within the Meaning of the Merchant Marine Act of 1920 (Jones Act)?

The reasoning of the Appellate Court makes it clear that the verdict of the jury was reversed because the court did not believe that the vessel was engaged in maritime work or in navigation. For example, the court said: "The dredge had arms or poles called 'spuds' which pushed into the bottom and held the position and there were also cables to the shore for additional anchorage," and added, "Other than these contacts with the ground, the barge had no means of locomotion." It also referred to petitioner as a person who is not aboard "except when the vessel was anchored."

In distinguishing this case from the case of **McKie v. Diamond Marine Co., 204 Fed. 2nd 132; Wilkes v. Mississippi River Sand and Gravel Co., 202 Fed. 2nd 383,** and other cases involving dredgeworkers relied on by petitioner, the court said:

> "Whether these cases should be regarded as close or as encroaching on enacted legislation is immaterial, they do not apply to a plaintiff employed under a union permit to perform common labor on a local project, and whose duties are performed while the outfit is securely attached to the ground."

The net result of this reasoning denies the benefits of the "Jones Act" to all men engaged in the usual and ordinary dredging operation on our navigable rivers and waterways.

The "James Wilkinson" was no different from the ordinary dredge; the operation it was performing on the 5th of November, 1951, was no different from the typical dredging work done daily on the various rivers throughout the country. This decision results in a conflict that must ultimately be resolved. Are dredge workers under the "Jones Act," as has been held by the various Circuit Courts of Appeal, or under the State Workmen's Compensation Act as indicated by the Fourth District Appellate Court of the State of Illinois?

The court reasons that petitioner could not be a seaman because he was only aboard the vessel when it was "anchored." A dredge can only perform its primary function when, to adopt the terminology of the court, it is "anchored." When the dredge is not "anchored" it is not, so to speak, working. The true test is whether or not the vessel is in navigation, and a dredge when it is "anchored" and dredging is just as much in navigation as a cargo ship crossing the Atlantic. It follows that the operating personnel of the dredge, i. e., the operator, engineer, oiler and deckhand, are all aiding in the navigation of the vessel.

Both respondent and the Appellate Court assumed that the James Wilkinson was a "vessel". Since this is true then when the vessel is performing the work for which she is designed, whether "anchored" or sunk to the bottom of the ocean as in **Gianfala v. Texas Co.**, she is in navigation. If these two premises are accepted, then the position of the Appellate Court becomes untenable, for how can a vessel be in navigation without a crew? If she has a crew, who are the members of the crew? They are those on board to aid the vessel in the performance of the work for which she was designed, those who conduct the dredging operation, including the petitioner who did everything aboard but operate and maintain the machinery. As was said in **Norton v. Warner Co., 321 U. S. 565 at 572, 64 S. Ct. 747:**

"His (functions) were indeed different from the functions of any other 'crew' only as they were made so by the nature of the vessel and its navigational requirements."

CONCLUSION.

In conclusion, we believe that because of its denial of petitioner's right to have his status determined by a jury, because of the conflict between this court's decision in Gianfala v. Texas Co. and South Chicago Coal and Dock Co. v. Bassett, supra, and the decision of the Appellate Court, and because of the far-reaching effects on litigants under the "Jones Act", this decision should be reviewed by this court.

Respectfully submitted,

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APPENDIX.

OPINION OF FOURTH DISTRICT APPELLATE COURT.

Filed Oct. 3, 1955.

Scheineman, J.

Jacob Senko brought this suit against his employer, LaCrosse Dredging Corporation, claiming that he had suffered personal injuries through the negligence of said employer. After a jury verdict of $30,000 for plaintiff, the trial court required a remittitur and entered judgment for $20,000. The defendant's motion for judgment and for new trial were both denied.

The suit was filed under the provisions of Section 33 of the Merchant Marine Act of 1920, commonly known as the Jones Act, 46 U. S. C. A., Sec. 688. In substance, the Jones Act provides that seamen on vessels operating in navigable waters, who are injured in the course of their employment, shall have the same rights and remedies at law which appertain to railway employees under other federal statutes. Questions presented on this appeal require a full statement of facts, and a review of the legislative and judicial background of the statute, since it is an unusual type of case in a state court.

Defendant operated a dredge on which plaintiff was employed. At the request of a labor union, defendant had erected a shed on land near its dredging operations, equipped with benches and a stove, so that, during off-duty intervals, the workmen would have a place to warm themselves and obtain shelter. The incident in question occurred in or near this shed on November 5, 1951.

About 10:45 P. M. plaintiff came from the dredge to the shed, where he heard another employee (the assistant

superintendent) say that he would put some coal on the fire. This was done by removing a stove lid, picking up a coal bucket, and emptying the contents in the stove. Apparently plaintiff did not actually see the operation, but the fire flared up with a great flash and both men ran out, colliding at the doorway and falling. Or perhaps plaintiff was just approaching the door from outside and was met by the running man. Plaintiff was somewhat vague as to the details, but anyway, he fell. He claims severe injuries resulted to him.

It is plaintiff's theory that he is a seaman under the Jones Act, that there must have been something other than coal in the bucket to cause the flash, that he has not attempted to prove specific acts of negligence, but defendant should be held liable under the doctrine of res ipsa loquitur.

Defendant contends it is entitled to a directed verdict, because: 1, plaintiff was not a member of a crew of seamen and is not under the Jones Act; 2, the dredge was not operating in navigable waters, and 3, there was no evidence of negligence on its part and no basis to apply the doctrine of res ipsa loquitur.

From examination of the abstract and briefs, we find no dispute as to the facts material to the first defense. It appears that, prior to plaintiff's said employment, the dredging equipment had been brought to the site by a tug, during which movement, the crew of the tug managed the dredge and provided it with navigation lights. The dredge was anchored about 15 feet from shore in Gabaret Chute, which is a slough connected with the Mississippi, the purpose being to dredge out a by-pass around a rocky section of the river, through the slough to a canal connected to the river at another point.

The dredge consisted of a scow or barge upon which was mounted dredging machinery, pumps, dynamo, etc. It

operated day and night, so that it had a lighting system, including the white mooring lights required on stationary objects. A pipe ran from the barge to the shore, through which excavated material was pumped and disposed of. The pipe rested on pontoons, and this formed a walk, with handrail, by which the men could come and go. There was also a rowboat, but the distance from shore was too short to row, so in using the boat, it was simply given a push to move it the few feet.

The dredge had arms or poles called "spuds" which pushed into the bottom and held the position, and there were also cables to the shore for additional anchorage. The barge could be moved slowly by operating the spuds in a walking fashion, also by winding the cables on a winch. Other than these contacts with the ground the barge had no means of locomotion.

Dredging operations were conducted by four men aboard, an operator, an engineer, an oiler, and plaintiff. Defendant did not furnish meals or sleeping quarters, all the men lived ashore, worked eight-hour shifts, were paid by the hour, and plaintiff drove back and forth daily from his home some 40 miles distant. Of the four men, the first three were members of a building crafts union, and plaintiff was a member of the Common Laborer's Union at Mt. Olive. He secured this employment through the union hall at Granite City, and all four men had union permits to work at this particular site.

According to a witness permitted to testify as to the usual duties of a laborer or deckhand on a dredge, the duties were to clean the deck, also the navigation lights, and to take soundings when the barge was in motion. However, these items were not pertinent to the plaintiff, for there were no navigation lights on the dredge, and he had taken soundings only for the purpose of noting the depth of the cut. He had nothing to do with moving the barge

and testified he had never been aboard when it was moved. He gave as his main duties the delivery of supplies and proper storage thereof, bringing them when needed, and sometimes taking things ashore where other men were working at earth moving.

From the foregoing, it is apparent that, by any ordinary test, the plaintiff would not classify as a seaman. However, the courts have enlarged the meaning of the term. It was often said that a seaman aiding in navigation was not limited to those who can "hand, reef and steer." Thus it was easy to include all those who customarily traveled with a vessel in its movements, such as a cook, a clerk, a stewardess, etc. But the broadening of the definition continued, until it came to include practically any workman whose duties required him to set foot on a ship at any time or place. Thus, longshoremen were designated as seamen, although they worked only at loading or unloading a vessel tied at the docks.

A longshoreman injured in the course of his duties on land would normally come under the state's workmen's compensation act, but if the injury occurred on the vessel while it was in navigable waters, the state law could not apply, for the federal law had jurisdiction. These men were given some remedy by calling them seamen under the Jones Act.

Men who ply the seas, with its hazards, rigors and isolation, have long been regarded as wards of the court in admiralty, and this solicitude has been applied in courts of law. Men who board the ship only in the safety of a harbor, who work only an eight hour shift thereon, who return to their families daily, and sleep in the comfort and security of their own beds every night are not in exactly the same position. Congress proceeded to enact new legislation, which was, in substance, a compensation act.

Possibly the men involved had something to do with the new legislation, since they were in position to observe the operation of both types of laws. The new law enacted by congress, known as the Longshoremen's and Harbor Workers Compensation Act, 33 U. S. C. A., Sec. 902 (1927), is patterned after prior compensation acts, provides recovery for personal injury in line of duty regardless of absence of negligence and makes the remedy limited and exclusive.

The legislative history of this act is reviewed in South Chicago Coal and Dock Co. v. Bassett, 309 U. S. 251, 60 S. Ct. 544, 84 L. Ed. 732. It appears that ships' masters and crews preferred to remain under the Jones Act; accordingly, a provision was inserted in the new act excluding "seamen". Obviously, under the prevailing definition of that word, practically everybody that congress intended to include, would have been excluded. As finally passed, the words "master or member of a crew" were substituted for "seamen." The Supreme Court held the purpose was:

> "to provide compensation for a class of employees at work on a vessel in navigable waters who, although they might be classed as seamen, were still regarded as distinct from members of a 'crew.' They were persons serving on vessels, to be sure, but their service was that of laborers, of the sort performed by longshoremen and harbor workers and thus distinguished from those employees on the vessel who are naturally and primarily on board to aid in her navigation."

In the above case the man involved had the primary duty of loading coal on vessels in harbor, but he was aboard the fueling vessel when it was in motion, he was called a "deckhand" and occasionally had incidental duties in connection therewith, such as throwing a ship's rope or making the boat fast. The court attached no significance

to his title and held these were duties which could readily be performed or aided by a harbor worker, and that he came under the compensation act, rather than the Jones Act, observing:

> "that the primary duty of the decedent was to facilitate the flow of coal to the vessel being fueled, that he had no duties while the boat was in motion, that he slept at home and boarded off ship and was called each day as he was needed. Workers of that sort on harbor craft may appropriately be regarded as 'in the position of longshoremen or other casual workers on the water.'"

The legislative history of these acts and the interpretation thereof was repeated in Swanson v. Marra Bros. (1946), 328 U. S. 1, 66 S. Ct. 869, 90 L. Ed. 1045. The man involved was engaged in loading cargo onto a vessel in Philadelphia harbor, and he was struck by a liferaft falling therefrom while he was on the pier. The suit was brought under the Jones Act and was dismissed by the trial court. The decision was affirmed on intermediate and final appeals. The Supreme Court recognized that the suit would have been proper under the Jones Act according to its own decisions prior to the passage of the Longshoremen's Act of 1927, making particular reference to International Stevedoring Co. v. Haverty, 272 U. S. 50, 47 S. Ct. 19, 71 L. Ed. 157, decided only six months before passage of the new statute. The court ruled:

> "We must take it that the effect of these provisions of the Longshoremen's Act is to confine the benefits of the Jones Act to members of the crew plying in navigable waters and to substitute for the right of recovery, recognized by the Haverty case, only such rights to compensation as are given by the Longshoremen's Act."

Other cases on the subject are similar in effect, see particularly, Walling v. Bay State Dredging Co., 149 F. 2d

346, 161 ALR 825, Cert. Den. 326 U. S. 760, 66 S. Ct. 140, 90 L. Ed. 140.

This court therefore holds as a general proposition: an employee whose principal duty is to load supplies on a vessel at anchor, and to perform incidental tasks of a common labor character, and who is not naturally and primarily on board to aid in navigation, cannot maintain an action under the Jones Act.

Further, as to this particular case: it being undisputed that plaintiff lived and boarded ashore, worked the hours of laborers only, was paid by the hour, had the primary duty of loading material and supplies on board, or unloading them, and of performing various other incidental common labor tasks, and who was not employed for nor used in the movement of the vessel from place to place, and was not aboard except when the vessel was anchored, he cannot maintain an action under the Jones Act.

III.

Further, that the provision of law making the compensation act the exclusive remedy of employees on vessels other than the master and members of the crew, is binding on the court and cannot be evaded by asserting that a jury's notion of what law should be applied nullifies that provision, where there is no substantial dispute as to the relevant facts.

Cases which plaintiff contends are contrary to the foregoing holding have been considered by this court, particularly the Circuit Court cases upholding verdicts under the Jones Act, namely, Gahagan Const. Corp. v. Armao, 165 Fed. 2nd 301; Kibadeaux v. Standard Dredging Co., 81 Fed. 2nd 670; McKie v. Diamond Marine Co., 204 Fed. 2nd 132; Maryland Cas. Co. v. Lawson, 94 Fed. 2nd 190; Wilkes v. Mississippi River Sand and Gravel Co., 202 Fed. 2nd 383.

These cases cannot be regarded as in point, for the reason that they all involve employees who customarily accompanied the vessel on its voyages, whether extended or daily. This court does not hold that members of the crew or those aiding in navigation consist only of those who "hand, reef and steer." It is to be doubted employees who sign on for a voyage are excluded from the Jones Act, whether they be cooks or sometimes laborers.

Possibly phrases can be plucked from these opinions as indicating a tendency to broaden the definition of "crew" or of "aiding in navigation", but there will necessarily be close cases of employees traveling with the vessel. In the Gahagan case the plaintiff ate and slept on board on a trip from New York to Boston, worked out in the sea harbor when the tide permitted, and had some regular duties of a maritime nature.

In the Kibadeaux case the vessel went from port to port around the entire coast, and plaintiff was paid on a semi-monthly basis, like other members of the crew. The McKie case, by a divided court, involved a dredge which traveled about in Tabb's Bay off the Texas coast, and plaintiff worked at whatever travel there was by the vessel. In the Maryland Casualty Co. case the plaintiff was actually a common laborer, but he necessarily went to sea with the outfit, ate and slept aboard, making more or less regular runs with the crew. In the Wilkes case the court noted that the plaintiff had a permanent connection with the vessel such as to expose him to the same hazards of marine service as those shared by all aboard.

Whether these cases should be regarded as close or as encroaching on enacted legislation is immaterial, they do not apply to a plaintiff employed under a union permit to perform common labor on a local project, and whose duties are performed while the outfit is securely attached to the ground.

Since the plaintiff is not under the Jones Act, it is unnecessary for this court to pass upon other points raised.

In conclusion it may be observed that plaintiff is not without remedy. The injuries occurred on land so that the case is not confined to federal jurisdiction. The record discloses that plaintiff actually filed a claim with the Illinois Industrial Commission, and at a proceeding before its designated hearing officer plaintiff and defendant stipulated they were under the Illinois Compensation Act and that defendant had made payments thereunder including medical and hospital expenses, and 14 weeks temporary and total disability compensation. We did not deem it necessary to make this any part of the decision herein.

For the reasons given, the judgment is reversed.

Judgment Reversed.

Bardens, P. J., and Culbertson, J. concur.

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